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No. 92-489

In The

Supreme Court of the United States

October Term, 1992

ELPIS SAKARIA,

Petitioner,

v.

ALLSTATE LIFE INSURANCE COMPANY
MINNESOTA MUTUAL LIFE INSURANCE COMPANY
AMEX LIFE ASSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITIONER'S BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: **Page**

Business Guides v. Chromatic Communications Enterprises, Inc., 498 U.S. ___, 111 S.Ct. 922 (1991) 5, 7, 8

Carlson v. Green, 446 U.S. 14 (1980) 3

Chambers v. NASCO, Inc., 501 U.S. ___, 111 S.Ct. 2123 (1991) . . . . . passim

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1989) 5

Hormel v. Helvering, 312 U.S. 552 (1941) 2

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982) 3

Link v. Wabash RR, Co., 370 U.S. 626 (1962) 4

Mitchell v. Forsythe, 472 U.S. 511 (1985) 3

Pavelic & Leflore v. Marvel Entertainment Group, 493 U.S. 120 (1989) 5

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) 4

Singleton v. Wulff, 428 U.S. 106 (1976) 2

United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395 (1947) 3

United States v. Hudson, ___ U.S. (7 Cranch) 32 (1812) 4

Youakim v. Miller, 425 U.S. 231 (1976) 3

Young v. United States ex rel. Vuitton et Fils, 481 U.S. 787 (1987) 4

Statues:

Fed. R. Civ. P. 12(h)(3) 3

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Petitioner has demonstrated that the lower court, in sanctioning Mrs. Sakaria under the "bad faith" exception to the American Rule, based its judgment on a finding that Mrs. Sakaria's actions were not objectively reasonable. The "objectively reasonable" standard is, of course, the standard for sanctions under Rule 11, not for sanctions under the American Rule, which demands proof of malice or vexatious purpose. Petitioner further showed that Mrs. Sakaria was sanctioned

for continuing her suit through summary judgment, while her attorney was sanctioned for failing to advise her to dismiss the suit -- a fundamentally unfair result.

Respondents have failed to address these points squarely. Indeed, they virtually ignore the thrust of Petitioner's first question, arguing instead, that the issue was not raised below and thus waived (Br. in Opp. 8-11) and that in any event the Court should review the lower court's plain error of law for "abuse of discretion." (Br. in Opp. 12-16). As to Petitioner's second ground for review, Respondents do not contest the incongruity in the district court's stated position. Rather, they revisit the evidence in an effort to show that "the litigation was driven by [Mrs.] Sakaria rather than her counsel." (Br. in Opp. 17). There is no merit to Respondents' objections.

1. Respondents first contend that Mrs. Sakaria's claim with respect to the proper legal standard for imposing sanctions under the American Rule should be denied because the question is raised for the first time in this Court, and has therefore been waived.[1] The general principle on this score is well established. Ordinarily a party may not raise on appeal questions not passed upon by the lower courts. The rule is pragmatic and is grounded in the idea that presenting a question for the first time on appeal deprives the parties of an opportunity to present evidence to the lower courts. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

But these "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. at 557. "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Ibid.*

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1 Respondents' objection applies only to Petitioner's first question presented.

Thus, "the rule is not inflexible" (*Youakim v. Miller*, 425 U.S. 231, 234 (1976)) and the Court retains "the power to notice a 'plain error' though it is not assigned or specified." *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 412 (1947) (footnote omitted). This is particularly true where the question is "purely legal" (*Mitchell v. Forsythe*, 472 U.S. 511 (1985)), and represents "an important, recurring issue" and "[t]he interests of judicial administration will be served." *Carlson v. Green*, 446 U.S. 14, 18 n.2 (1980).

Petitioner's raising for the first time in this Court the issue of the proper legal standard for imposing sanctions under the "bad faith" exception works no unfairness. Moroever, there are compelling reasons for the Court to review a question of law lying at the heart of the courts' inherent powers.

First, the "applicable standard" question is a straightforward issue of law. It does not require, nor would its resolution be served by, an opportunity for Respondents to introduce additional evidence. Hence, neither Petitioner nor Respondents would be prejudiced in any fashion by the Court's addressing this question.

Second, and most significantly, the issue may properly be raised at this stage of the litigation because it goes to the exercise of the *inherent powers* of the courts below. *See Chambers v. NASCO, Inc.*, 501 U.S. ___, 111 S.Ct. 2123 (1991). In this respect, Petitioner's raising this issue is analogous to challenging a court's subject matter jurisdiction, *see, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694 (1982); Fed. R. Civ. P. 12(h)(3) (objections to subject matter jurisdiction are not waived and may be raised at any stage of the proceedings); or challenging a court's power under the "case or controversy" proviso of Article III of the Constitution. Because these are matters which go to the very core of the courts' constitutional and statutory powers to hear a case or mandate relief, they cannot be waived.

The propriety of a court's exercise of its inherent powers is logically prior even to these fundamental notions, for inherent powers "'are those which are necessary to the exercise of all others.'" *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (citations omitted); *see also Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 819-20 (1987) (Scalia, J., concurring) (inherent powers are those "necessary to permit courts to function").

The power to sanction under the American Rule is part of the courts' "'implied power'" and is "'governed not by rule or statute but by the control necessarily vested in the courts to manage their own affairs....'" *Chambers*, 111 S.Ct. at 2132 (*quoting United States v. Hudson*, ___ U.S. (7 Cranch) 32, 34 (1812), and *Link v. Wabash RR. Co.*, 370 U.S. 626, 630-31 (1962)). Accordingly, the Court has warned that "[b]ecause of their very potency, inherent powers must be exercised with restraint and caution" and, in particular, has indicated that the inherent power to sanction parties is "narrowly defined." *Chambers*, 111 S.Ct. at 2133.

The abuse of a court's inherent power to sanction should command this Court's attention at least to the same extent as would objections raised on the non-waivable grounds noted above. Indeed, the former is potentially more troublesome. The courts' exercise of their inherent powers is unenlightened by the strictures of any limiting legislation (as with subject matter jurisdiction) or this Court's clear guidance as to constitutional constraints (provided by the "case or controversy" requirement). As Justice Kennedy, joined by Chief Justice Rehnquist and Justice Souter noted in *Chambers*, Rule 11 "establish[es] explicit standards for, and explicit checks against, the exercise of judicial authority. By contrast, courts apply inherent powers without specific definitional or procedural limits." 111 S.Ct. at 2145 (Kennedy, J., dissenting). This state of affairs compromises a litigant's right to fair notice of proscribed conduct and jeopardizes the possibility of meaning-

ful judicial review for misapplication of the "bad faith" exception.

That the petition raises an issue of substantial importance is also evident in the careful attention which this Court has devoted to sanctions-related cases in the last three terms. Since 1989, the Court has issued no fewer than four decisions in this evolving area. *Chambers v. NASCO, Inc., supra; Business Guides v. Chromatic Communications Enterprises, Inc.*, 498 U.S. ___, 111 S.Ct. 922 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1989), and *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120 (1989).

Left unanswered by the recent cases is the question raised by Mrs. Sakaria's petition: When a court elects to exercise its inherent powers to sanction a litigant under the "bad faith" exception to the American Rule -- a non-statutory predicate for sanctions -- is "objective reasonableness" the proper standard? The confusion sown by the lower courts in this case is attributable to "how little guidance or limitation the undefined bad faith predicate provides." *Chambers v. NASCO, Inc.*, 111 S.Ct. at 2145 (Kennedy, J., dissenting).

The district court below plainly failed to observe the narrow definitions of its own inherent powers. The question presented by Petitioner is significant; it is one of law, not fact; and no conceivable prejudice can follow from this Court's clarifying the proper boundaries of the lower courts' authority to sanction under the "bad faith" exception.

2. In their opposition, Respondents have failed to address the central problem raised by Mrs. Sakaria's petition. The district court, after sanctioning Mrs. Sakaria's counsel under Rule 11, stated that Mrs. Sakaria was being sanctioned under the "bad faith" exception to the American Rule: "Sanctions are warranted against Mrs. Sakaria under the *bad faith exception* because of her misleading statements during

discovery and her continuation of this warrantless suit." Pet. App. 8a-9a (emphasis added). In the very next sentence and in unequivocal language, the district court offered its rationale: "[P]laintiff and her counsel, Mr. Huffman, continued this litigation ... well beyond that point where an *objectively reasonable person* would have dismissed the case." Pet. App. 9a (emphasis added).

Had the district court put the point less plainly, there might be at least a colorable basis for Respondents' suggestion that the court had merely invoked the concept of objective reasonableness inartfully. But the district court's conclusion is not ambiguous on this point. Moreover, it is difficult to conceive that both the magistrate and the district court could have employed the notion of objective reasonableness -- an elemental legal concept -- carelessly and without intending fully that the term be given its ordinary legal meaning.

Remarkably, elsewhere in their Opposition, Respondents reluctantly, or at least inadvertently, concede the point. Respondents' footnote 5 reads in full:

> [Mrs.] Sakaria does not address that the court recommended sanctions both under Rule 11 and the bad faith exception. See Pet. App. 19a-20a. [Mrs.] Sakaria does not argue that the Rule 11 sanctions, based on signing misleading Answers to Interrogatories, are inappropriate. However, the court did not distinguish between sanctions warranted under Rule 11 and those warranted under the bad faith exception.

Br. in Opp. 13 n.5. Respondents' first statement is incorrect; the magistrate did not recommend sanctions against Mrs. Sakaria under Rule 11. *See* Pet. App. 22a. The district court's ruling on this score is equally straightforward. Pet. App. 8a.

It is true that, as Respondents point out in this footnote, the magistrate referred generally to the standards for both Rule 11 and the "bad faith" exception (*see* Pet. App. 19a-20a), but this is unremarkable since the magistrate recommended sanctions against counsel under the one provision and against Mrs. Sakaria under the other. The genesis of the problem brought to light in the petition, however, is precisely as Respondents themselves state it: "[T]he court did not distinguish between sanctions warranted under Rule 11 and those warranted under the bad-faith exception." Br. in Opp. 13 n.5. Because the district court collapsed the Rule 11 and "bad faith" analyses into a single inquiry, the court applied the wrong standard to the "bad faith" sanction.

The district court's conflation of the two standards is not surprising. As Justice Kennedy pointed out in *Chambers*, the "undefined bad faith predicate" offers "little guidance" to courts prepared to exercise their inherent powers. 111 S.Ct. at 2145 (Kennedy, J., dissenting). Thus, it is not difficult to see how the clearly defined standard for Rule 11 cases proffered in *Business Guides v. Chromatic Communications Enterprises, Inc.*, *supra*, might be misapplied to cases involving the courts' inherent powers.

Respondents' arguments in opposition to the petition miss the mark in other respects as well. Respondents assert, for example, that the appropriate standard for review in this context is abuse of discretion. Br. in Opp. 12. This is plainly incorrect. Abuse of discretion is a fact-oriented assessment. Thus, had Mrs. Sakaria argued that the lower court improperly evaluated the evidence upon which the sanctions were based, abuse of discretion would be the operative standard. But that is not Petitioner's argument. Rather, Mrs. Sakaria has demonstrated that the district court applied the wrong legal standard to the facts. For this reason, Respondents' claims that the magistrate "was able to consider and weigh, first hand, Sakaria's testimony, demeanor and conduct" or that the district

court "was in the best position to assess the circumstances justifying sanctions" (Br. in Opp. 12) are irrelevant.

3. Finally, Respondents assert that the district court's express finding that Mrs. Sakaria's counsel, Mr. Huffman, "failed to advise plaintiff to dismiss the case in light of a lack of admissible evidence" (Pet. App. 8a) has "no colorable basis" and "does not warrant consideration" by this Court. Br. in Opp. 16. This claim is ill-conceived. The district court's *Memorandum*, which the district court judge characterized as the product of his "conduct[ing] a *de novo* review of the record in this case," Pet. App. 7a, says what it says. To the extent that Respondents disagreed with the district court's findings in this connection, they were free to file their own objections on appeal. But Respondents' challenge to the facts in this procedural setting has no relevance to the Court's decision whether to review this case.

Mrs. Sakaria's point remains. Assuming, *arguendo*, that an "objective reasonableness" standard for the "bad faith" exception were valid, it is manifestly unreasonable to sanction a represented party for failing to dismiss her lawsuit when the party's attorney is sanctioned for failing to advise her to dismiss the suit. As the Court noted in *Business Guides*, "[W]hat is objectively reasonable for a client may differ from what is objectively reasonable for an attorney." 111 S.Ct. at 933 (citation omitted). Because this result offends basic fairness, it should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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